FRENCH SPOLIATIONS AWARDS.

What is the true theory of distribution of the money awarded by the Act of Congress of March 3, 1899, in satisfaction of the French spoliations claims? To answer this question one must first give the story (in part) of the very conflicting decisions of the courts (as to the distribution under the similar Act of March 3, 1891) before the right theory was finally reached—if, indeed, it may be said to have been finally reached yet, so as to be binding in other States than Pennsylvania and Massachusetts.

We should begin with bearing in mind two facts; first that these spoliations were so long ago (say ninety years before the Act of March 3, 1891, was passed) that in every instance all the children of the original sufferer were dead, and there were no descendants nearer than grandchildren, sometimes, perhaps, none nearer than great-grandchildren; second, that while some of the sufferers from spoliations died intestate, others of them left wills. "Sufferer from spoliations" is a rather cumbrous phrase. "Claimant," which would have described him when he was living, is not the correct word for him now, but does describe correctly his administrator *de bonis non* (or *de bonis non cum testamento annexo*, as the case may be), appointed for the very purpose of collecting the claims. "Ancestor" will do very well in some cases, and in others we may use the more generic term, the law Latin *propositus*.

A little reflection will show us that there are several different theories from which to select as to distributing the awards, and the best way to bring out the differences in these theories will be to take the instance of ancestor William Gray in the much litigated Massachusetts case of Codman v. Brooks. In this case the spoliations award was $260,000, and the legal contest was, of course, a lively one.

William Gray, who died in 1825, left a will giving the residue of his estate to some—not all—of his children, and the four theories were as follows:

A. Distribution should follow the will.

B. Division should be first into fourths, because the ancestor left four children (all dead long before March, 1891) whose descendants were living, and then subdivisions should follow under such first division.

C. Division should be first into twenty-thirds, because twenty-three grandchildren were (in March, 1891) either living or (having died) had left descendants living; and then subdivisions, great-grandchildren taking by substitution, *per stirpes*.

[It seems almost unnecessary to add, by way of obvious corollary, that if the earliest generation of which one or more members is, or are, now living is not grandchildren, but great-grandchildren, then theory C would require that the division should be according to the number of great-grandchildren, with representation *per stirpes*.]

D. Division should be into nineteenths, because nineteen grandchildren were living (March, 1891) and children of deceased grandchildren should be excluded.

Affirming the decision of the court below, the Supreme Court of the State, by a majority of five to two, decided, according to theory A, that the will must govern, while Field, C. J., and Allen, J., dissented in favor of theory B: Codman v. Brooks, 159 Mass. 477 (1893).

The case was taken to the Supreme Court of the United States, with two other cases, one from Massachusetts and the other from Connecticut—both had adopted theory A—all were argued and decided together in 1896, the decision being entitled Blagge v. Balch, 162 U. S. 439. Justice Gray took no part in the decision, being related to the parties in interest in Codman v. Brooks. It is a curious fact that down to that time not one of the counsel in that case was contending for the theory which I have called C; they (one or another of them) were advocating all three of the other theories.

The Supreme Court reversed the judgments of the Massachusetts and Connecticut courts and remanded the cases. But that was not the end of Codman v. Brooks. The opinion of the Supreme Court (Fuller C. J.) was by no means clear. Theory A was rejected, but beyond that it would seem that nothing was decided. When the case came on again in the Suffolk County (Boston) Court, before Justice Allen, he decided according to theory B. On appeal, heard in the Supreme Court of the State by five of the judges, the case (167 Mass. 499) was, in 1897, finally decided according to theory C (the opinion by Knowlton, J.), "The money . . . will be divided into twenty-three equal shares, of which one will be given to each of the surviving grandchildren, and one to the children of each of the deceased grandchildren." Allen J., dissented, still maintaining that theory B was the one that the Supreme Court of the

United States had meant them to adopt. "This," he says, "seems to me to be the meaning of the language used."

What was the fate ultimately of the Connecticut case, after it was thus remanded, does not appear in the reports of that State.

In Pennsylvania the litigation over this question had also a checkered career. In the Clement estate case (Orphans' Court of Philadelphia, November, 1891), Judge Ashman decided according to theory C, Hanna, Presid't J., affirming (November 14) in an opinion to be found in 48 Phila. Leg. Int. 474. Two weeks later (Nov. 28), Stokes' estate case, 48 Phila. Leg. Int. 498, was decided in the same court according to the same theory by Judge Hanna, in a brief but comprehensive and very clear opinion. From this decision no appeal was taken. The Clement's estate case was appealed and the decision of the Orphans' Court was in July, 1892, reversed by the Supreme Court of the State, but on a second appeal in 1894, that court overruled their earlier decision, saying very frankly that further consideration had convinced them that their first views were not sustainable. In brief this court now and finally adopted theory C as the true one: Clement's Estate, 150 Pa. 85, and 160 Pa. 391.

Discussion is omitted of decisions on spoliations claims in the Court of Claims. Some of these are instructive from the point of view of rejection of theory A, but they do not help us to decide among the other theories. In the Supreme Court of the District of Columbia, there was one case which will be mentioned briefly later.

The decisions in Pennsylvania and Massachusetts in favor of theory C, will, of course, carry much weight in other States, but, perhaps, their highest courts may feel at liberty to reach some other conclusion.

I ask to be allowed to discusss the question from the point of view of a Maryland lawyer, but before considering the Maryland decisions on spoliations awards, we must consider the state of facts (which frequently arises) when there are no living descendants of the *propositus*, and the nearest relations are collaterals. To this state of thing we must apply theories, which we may call "Collateral B," "Collateral C." "Collateral B" would begin with a division into the number of the brothers and sisters of the *propositus* (if more than one leaving issue), and then subdivisions; if only one such brother or sister, then with division into the number of nephews and nieces, etc., and then subdivisions;—would begin in short, with some far back gen-

eration (*every member of which had died* before March 3, 1891), to fix the number of *stirpes*. "Collateral C," on the other hand would begin—as the starting point of the *stirpes*—with the earliest generation of which one or more members is, or are, now living, and then subdivisions.

It is evident that, starting under *either* of these schemes of division, there *might* be either an *allowance throughout* of the principle of *representation*, or there might be a *refusal* of it at some arbitrarily selected generation.

In Maryland there have been six cases on the distribution of spoliations awards, all in the Circuit Court of Baltimore City. Two of them, Corrie's Estate and Hollingsworth's Estate, do not count, one might say, for in each case the ancestor had but one child who left descendants, and so there was no chance for any choice between theories B and C. In two other cases, Carrere's Estate and Tennant's Estate, which did present the usual questions, theory B was adopted without any discussion, and distribution was made accordingly. In Yellott's Estate and Owings' Estate there were no descendants of the *propositus*, and in both these cases distribution was according to "Collateral B," but they differed in this, that in the latter case (auditor's account ratified in February, 1899), representation was disallowed beyond grandnephews and grandnieces, while in the former case (1892) it was (correctly, I submit) allowed indefinitely (some grandchildren of grandnephews receiving so small a fraction as one-six-hundred-and-seventy-second).

[Owings' Estate presented the curious fact that there had been *two* Beal Owingses, both merchants in Baltimore, and both alleged to be sufferers from spoliations. The descendants of one asserted that their ancestor was the person whom the administrator (to whom the award had been made) really represented, while the grandnephews, &c., of the other Beal Owings insisted—and successfully—that *he* was the person whom the administrator represented, and that the other lot of people were rank outsiders. The award was not a large one, and after an appreciable amount of it had been spent in litigation, it is not very surprising that descendants of grandnephews failed to make a fight over the question of representation *vel non*.]

None of the cases went up to the Maryland Court of Appeals. An earlier case, however, Brooks v. Ahrens, 68 Md. 212 (1888)—which has been frequently cited—has, by an analogy, thrown some light upon a side issue connected with the subject.

Here I may be allowed to mention parenthetically (what is only a circumstance, not an authority) that as long ago as February, 1893, there was a distribution made according to theory C, in the Orphans' Court of Baltimore City, by an administrator *d. b. n. c. t. a.* (George Brown's Estate). Because the ancestor had been a stockholder in the Baltimore Insurance Company, to which an award had been made, a small sum came to the hands of the administrator, but the sum was so very small that it was not worth while to make up a case in court and have a decision about it, and the administrator took the responsibility, not a very heavy one, of distributing according to his own view of the law. Vivid recollection of the distribution of this ancestral windfall may be explained by the fact that my own share of it reached the giddy total of $3.07. "The half-penny be dem'd," said Mr. Mantalini, but, in the cause of accuracy, I record the seven cents. There were in our Orphans' Court, a number of other stockholders'-estates distributions, some according to theory A, some according to B;—none, I believe, according to theory C, except the distribution above mentioned.

From this personal and local digression returning to our authorities, and first remarking that for the most part the decisions in the appellate state courts on French spoilations are none too clear in their statement of the questions, or of the answers reached, we should now consider the difficulties of the decision of the United States Supreme Court in Blagge v. Balch. One of the Massachusetts judges, as we have seen, thought "the meaning of the language used" established theory B, while his colleagues, holding otherwise, decided in favor of theory C. Careful study will, I think, lead to the conclusion that the Supreme Court's decision is *merely against theory A*, leaving any other questions to be settled in each state as its own courts may interpret its own statutes of distribution. If, to obtain any further light than this, we turn to the cases cited, we find that they furnish no clue, our study of them only results in darkening counsel, for the Court cites within one page decisions from Massachusetts (three), from New Hampshire (one), Connecticut (two), New York (three) and North Carolina (two), and the lawyer examining these cases will find that some of them tend to sustain theory D, rejecting C; one to sustain C, rejecting D; one to sustain B, rejecting C. Some of the cases seem but slightly applicable. Of the three Massachusetts decisions, two more nearly sustain either theory B or C than D, and one sustains D rather than B or C.

Extremely puzzling is the concluding sentence (page 465): "The Supreme Court of the District of Columbia, Gardner v.

Clarke, 20 D. C. 261; the Supreme Court of Pennsylvania, Clement's Estate, 160 Pa. 391, and the Circuit Court of Baltimore County, Maryland, Leffingwell's Estate, 49 Phil. Leg. Int. 147, have expressed similar views to the foregoing."

Let us see. First noting that there was no Leffingwell Estate case in Baltimore County, or in Maryland, and that this would seem to be a mistake for the Leffingwell case in *Connecticut* (62 Conn. 347)—the earlier (i. e. New Haven Probate Court) decision in that case being *in fact* reported in the Philadelphia Legal Intelligencer *at the page cited*—and noting also that in that case when it reached the Supreme Court of that State (decided there in November, 1892), that court, *affirming* the decision below, avowedly followed the "very clear and cogent" decision in the Clement's Estate case (in 150 Pa., which was afterward overruled), saying: "We have followed the general outline and to a considerable extent the language of that opinion, as expressing our own views" (62 Conn., at page 363)—the reader is confronted with the difficulty that while the Pennsylvania case, in 160 Pa., decides, as we have seen in favor of theory C, the District of Columbia case is flat in favor of theory B, and the Connecticut (Leffingwell) case pronounces with equal emphasis for theory A! The Supreme Court's views expressed by those three decisions, all thus approved in one breath, one of them being a case they were in the very act of reversing! *Dormitat Homerus.*

[It so happens that on the *same page* of the Philadelphia Legal Intelligencer (page 147 of vol. 49) where the Leffingwell case is reported, there is reported *also* the Maryland case of Carey v. Morris (Hollingsworth's Estate). This decision rejected theory A, but was inclusive (*vide supra*) as between B and C. It seems quite possible that the Chief Justice *meant* to refer to Carey v. Morris (Circuit Court of Baltimore *City*) when he wrote "Leffingwell's Estate." If this conjectural emendation be correct, it removes part of the difficulty.]

The tale of surprises is not quite all told. The very earliest decision in favor of theory C was, as we have seen, in the Orphans' Court of Philadelphia (on November 14, 1891). Yet, when Gardner v. Clarke was decided in the District of Columbia on the last day of that month, the court said: "We are glad to find that we are anticipated in this conclusion by the Orphans' Court of Philadelphia in a case to which our attention has been called" (citing Clement's Estate as just reported in 48 Phila. Leg. Int. 474), and then proceeded to decide in favor of theory B! We should note, also, a mistake in the latest

decision in Codman v. Brooks. The opinion says that "Gardner v. Clarke, which is cited as an authority for a different method of distribution [theory B], was decided under the statutes of Rhode Island, where the distribution is *per stirpes* without regard to the degree of kinship, and it is therefore not material to the question before us." That case was not decided under the statutes of Rhode Island. It referred neither to statutes nor decisions of that state. The decision (in favor of theory B) was based upon general principles and upon one case only (Clement's Estate, in the Orphans' Court), of which such singular use was made. Justice Knowlton seems to have mistaken the last paragraph of counsel's argument for the opinion which immediately follows it with very little of typographical emphasis or break to distinguish them. (See page 263 of the report in 20 D. C.)

The story of these spoliations cases, first and last, has been a very strange one.

As the upshot of it all, what will probably be declared to be (say in Maryland) the law? If the Supreme Court's decision should be held to decide nothing except rejection of theory A, theory C still has in its favor the emphatic and final Pennsylvania decision in Clement's Estate and the latest Massachusetts decision in Codman v. Brooks, and it has also in its favor (so I think most lawyers would say) a greater inherent reasonableness than has any other of the theoris so far mentioned.

But, even so, is that the last word on the subject? Is there not perhaps some other scheme of distribution which may be preferable even to theory C?

With some hesitation I venture to suggest that there is.

The question can be presented with so much more clearness and brevity in the concrete (than in abstract terms), that it will be well to come back to the award distributed to William Gray's descendants—division into twenty-thirds, nineteen of which went to living grandchildren and four to children of deceased grandchildren. These grandchildren (living and deceased) were (let us note here) as follows: Ten (all living) were the children of William Gray's son Henry; five (all living) were the children of son Horace; four (three living and one, Francis, deceased), were children of son William, and four (one living and three, William, Samuel and John, deceased) were children of daughter Lucia G. Swett. (See table of descendants on page 500 of 167 Mass.)

And now, to make the discussion simpler, let us take figures, and assuming at a mere venture (for I do not pretend to have

any data on the subject) that (after settling with the attorneys who obtained the favorable legislation and paying all the costs of litigation and administration) there may have been $150,000 left to distribute, let us see how the money went. To begin with, each of the nineteen living grandchildren got his or her twenty-third, $6,521.74, the nineteen receiving, together, say $123,913.04. But how about the remaining four twenty-thirds (aggregating $26,086.96) for the great-grandchildren? Who got that, and in what proportions?

First, how many and who were these great-grandchildren? They were twelve in number, five being children of Francis Gray, five of Samuel Swett, one the daughter of William Swett, and one the daughter of John Swett, and they got the following shares: The daughter of W. S. got $6,521.74 (one twenty-third of the $150,000) and so did the daughter of J. S., and each child of F. G. and of S. S. got $1,304.35, or one-fifth of one twenty-third of the $150,000.

Now was that the correct distribution? Or ought each of those twelve grand-grandchildren to have received one-twelfth of $26,086.96 (= one sixty-ninth of $150,000), say $2,173.91?

Is there anything to be said in support of this last suggestion? I submit that there is.

The whole question turns on the principle that *equality is equity*. This—like any good maxim—is well nigh (if not quite) axiomatic, and is oftener silently recognized than formally stated. Authority is hardly needed, but Co. Litt, 24 b; Doyley v. Attorney-General, 4 Vin. Abr. 485, pl. 16; Farwell on Powers, p. 476, and Richmond v. Irons 121 U. S. 27, 44, may be cited for "the principle of equality in which equity delights."

Ninety years and more before the Act of March 3, 1891, certain American citizens suffered wrong through spoliations committed by French cruisers, and the righting of the wrong was (for valuable consideration) assumed later by the United States as part of and under the terms of its treaties with France. For ninety years the United States neglected this duty, and then, by way of tardy reparation long after the sufferers were dead, did (on March 3, 1891) the nearest thing practicable to the unperformed duty by awarding money to the "next of kin" (*descendants*, if there were any) of the sufferers. These descendants were, as we have seen, *grandchildren* (never nearer than that, possibly all great-grandchildren, generally some grandchildren and some great-grandchildren). Taking the case where *all* were grandchildren, they were entitled, because of their *equality* in *blood* of their ancestor, to share *equally*. It is but

one step to take (and a perfectly obvious one) to say that when, out of twenty-three grandchildren either living or deceased leaving children, nineteen are living and (*because* of the principle of equality) receive equally among them nineteen twenty-thirds of the award, the remaining four twenty-thirds must (*because of the same principle*) be divided equally among the twelve great-grandchildren.

But what then becomes, it may be asked, of the rule of division *per stirpes?* The answer is that it is overridden by the principle of *equality* in the case of the great-grandchildren, just as it was overridden by the same principle in the case of the grandchildren.

The children of Henry Gray (son of the *propositus*) may be taken to have said: "We are ten, and *because* we are ten, we must have (among us) ten nineteenths (that is to say, *each* of us *one* nineteenth) of the $123,913.04 which goes to the nineteen living grandchildren, and this in spite of the fact that our father was one of *four* children and would have been entitled (*if* the award had been made one generation earlier) to *only one-fourth* of the whole $150,000." By the same token, the five great-grandchildren, the children of Francis (deceased), must be taken to have said: "We are five, and *because* we are five, we must have (among us) five twelfths (that is to say, *each* of us *one* twelfth) of the $26,086.96 which goes to the great-grandchildren (twelve in number), and this in spite of the fact that our father was one of *four* grandchildren (deceased leaving children) and would have been entitled (*if* the award had been made in his lifetime) to only $6,521.74, *his one-fourth* of that sum of $26,086.96 (or, which is the same thing, his one twenty-third of the whole $150,000). No *per stirpes* objection should stand in our way any more than it stood in the way of the living grandchildren. *We* rely—as *they* have been relying—on the principle of *equality.*"

I submit that the analogy is perfect, and that such an argument, if it had been advanced in behalf of those great-grandchildren, could not easily have been answered.

The concrete instance above given is so much clearer than any general statement of this scheme of distribution that it seems hardly worth while to formulate the latter; but if it be wanted, it would be something like the following:

Modified C: [When there are (*a*) living grandchildren and (*b*) children of deceased grandchildren.] Division should be first into two sums corresponding to two fractions; the numerator of the first is the number of living grandchildren, the

numerator of the second is the number of grandchildren deceased leaving children, and the denominator of both is (of course) the sum of the two numerators; the first sum should be divided equally among the living grandchildren, and the second equally among the children of deceased grandchildren.

In this "case arising under a law of the United States," would it not have been within the constitutional power of the Supreme Court to fix upon a definite scheme of ascertaining the "next of kin" and of distribution among them? If so, it it would seem, I submit, to be matter for regret that the court did not do so, insead of indicating that the fund should pass to those persons (of the blood of the original sufferers) who would be entitled under the statutes of distribution of each State: Blagge v. Balch, page 462. These statutes differ somewhat in different states. The statement (on page 464) that "in all the states real estate descends equally to the children of the decedent, and to the issue of deceased children taking *per stirpes*, and in most of them the personal estate is distributed in the same manner," is not accurate. The state statutes (which are summarized in 1 Stimson's Am. Stat. Law, §§ 3101-3103) are uniform as to descent (and "in most states the personal property is distributed precisely as the real estate descends") in the case of *children living*, but *differ* in the case of *children dead, grandchildren living*—the very case which arises in these spoliations awards—among the states which so differ one from another (descent *and* distribution) being Massachusetts and Connecticut, from which two states came the cases then before the Supreme Court! And again, when there are *no descendants*, but only *collaterals* of the *propositus*, the state statutes differ materially. (See §§ 3107, 3138 of Mr. Stimson's work.) And what are we to do when, under statutes, or decisions, or both (as in Maryland and other states) there is "no representation among collaterals after [or beyond] brothers' and sisters' children?" What light, *if any*, does such exclusion throw upon the question how to distribute when the very *earliest* in blood who are living are "after" brothers' and sisters' children—are grandnephews, etc.? In such state of things, which decision is correct—that in the Yellott Estate or that in the Owings Estate (*supra*)? We must remember always that in *no state was a statute ever passed which contemplated a distribution taking place sixty, seventy or ninety years after a given death.* It would seem more fitting that in the distribu-

tion of these awards, the determination of the beneficaries and their shares should not be left to possibly divergent decisions upon varying statutes, but should be uniform throughout the the country.

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Errata should be noted in Blagge v. Balch (162 U. S,) as follows (beside the mistake in assigning the Leffingwell case to the Baltimore County Court, as above mentioned): On page 455, for "22 C. Cl., 721," read "22 C. Cl., 1;" on page 464, for "2 Jarman on Wills (5th ed.), *108, *109," read 2 Jarman on Wills (5th Lond. ed.), *1008, *1009;" in Gardner v. Clark (20 D. C.), on page 263, for "45; Legal Intelligencer, 478," read "45 Phila. Leg. Int., 474;" in Clement's Estate (150 Pa.), on page 86, for "448 Leg. Int., 474," read "48 Phila. Leg. Int., 474."

Vide also Guy v. Baltimore, 100 U. S. 434 (reversing Baltimore City Court), Hanley v. Donoghue. 116 U. S. 1 (reversing Court of Appeals of Maryland). Also

Article on Voidable and Void Judgments, 19 American Law Register (N. S.) 673 (1880). (See same subject continued in 32 Am. Law Reg. and Review, 213 (1893) and in Freeman on Judgments, 4th Ed., Sec. 557).

Brief note on Windfalls 20 Am. Law Reg. (N. S.) 392 (1881).